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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 447

BEARING JOBBERS, INC., M. H. LESCURE and M. M. LESCURE,

Petitioners,

vs.

NICE BALL BEARING COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Introduction 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement 3

Proceedings in the District Court 4
The Opinion of the Court of Appeals 5
Respondent's Admissions 7

Specification of Errors to be Urged 10

Reasons for Granting the Writ 11

Conclusion 16

CITATIONS.

E. I. duPont de Nemours & Co. v. Martin, (CA-6) 174 Fed. 2d 602 16

Euclid Candy Co. v. Whitney-Central Trust & Savings Bank, (CA-6) 48 F. 2d 757 12

Harniska v. Dolph, (CA-9) 133 Fed. 158 13

Helis v. Ward, 308 U.S. 365 ..... 14, 16

Hill v. Federal Trade Commission (CA-5) 124 Fed. 2d 104 11

Historical Pub. Co. v. Jones Bros. Pub. Co., (CA-3) 231 F. 638 12

PAGE

Jones v. Morehead, 1 Wall. (68 U.S.) 155 ..... 11, 16

O. F. Nelson & Co. v. United States, (CA-9) 149 F. (2d) 692 13

Reynolds v. Stockton, 140 U.S. 254 14

Saunders v. Shaw, 244 U.S. 317 13

Shanley v. Bowers, (CA-2) 81 Fed. 2d 13 13

Simms v. Andrews, (CA-10), 118 Fed. 2d 803 15

STATUTES:

28 U.S.C. 2101(c) 2

28 U.S.C. 1254 2

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Petitioners Bearing Jobbers, Inc., M. H. Lescure and M. M. Lescure, defendants-appellants in the court below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on July 20, 1953.

OPINION BELOW.

The opinion of the Court of Appeals (R. 773) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals became final upon the denial of the petition for rehearing on September 8, 1953 (R. 835).

This petition is filed within ninety days as allowed by law. 28 U.S.C. 2101(c). The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals for the Seventh Circuit, in affirming a judgment of the District Court in favor of plaintiff, on the basis of its determination of an issue not tried by the District Court and not presented on the appeal, which determination was contrary to admissions by plaintiff in its pleadings and at the trial, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. Whether in so doing and thus denying to petitioners (defendants below) notice of and an opportunity to be heard on this newly created issue, the Court of Appeals has denied petitioners due process of law in violation of the Fifth Amendment to the Constitution of the United States.

3. Whether the judgment below on the merits is contrary to the law and the evidence.

STATEMENT.

This action was commenced on March 9, 1950, by plaintiff, a Pennsylvania corporation engaged in the business of manufacturing and marketing anti-friction bearings. (R. 72) Defendants were M. H. Lescure, plaintiff's midwestern sales representative and president and director of Bearing Jobbers, Inc., Marie M. Lescure, his wife, secretary-treasurer and director of Bearing Jobbers, Inc., and Bearing Jobbers, Inc., a Delaware corporation.

Bearing Jobbers, Inc. was organized April 10, 1930, to distribute plaintiff's automotive bearings for replacement use (R. 71, 397). The ownership by plaintiff of Bearing Jobbers, Inc. was kept secret from the outset and plaintiff at all times announced to the trade and to the public that M. H. Lescure was the owner of that company, even at the inception of the company when admittedly he was not. R. 220-2, 374, 401-3, 477, 585

The primary issue in the case is the meaning and effect of a contract entered into between the parties on August 7, 1931, whereby plaintiff sold and defendant M. H. Lescure purchased the capital stock of Bearing Jobbers, Inc. and whereby the stock was pledged with plaintiff to secure payment of the purchase price. The contract is set forth in full at R. 10-11.

The contract was executed according to its terms by the issuance and delivery of the stock certificate to Lescure (R. 10, 78) and the redelivery by him to plaintiff to complete the pledge. (R. 11, 438) The purchase price was not paid during the period provided by the agreement, *viz.*,

January 1 to January 10, 1933, and remained unpaid until 1940, when it was paid by means of a dividend declared on the Bearing Jobbers stock, which was forwarded to plaintiff because of the assignment of dividends given as security for the performance of the contract of August 7, 1931 (R. 125). To remove the question of payment as an issue in the case, the purchase price was tendered in full February 21, 1950. R. 590

The financial position of both plaintiff and Bearing Jobbers, Inc. remained in jeopardy during the thirties, and from 1934 until 1939 plaintiff was operated by a committee of creditors. R. 682

B. G. Nice, who acted for plaintiff in 1931 in the negotiation of the contract, died prior to the time suit was commenced. Testimony of M. H. Lescure as to the transactions in question was excluded under a section of the so-called dead man's statute. Ill. Stats. Ch. 51, Sec. 4, R. 399.

Plaintiff's complaint alleged that plaintiff was the sole owner of the outstanding shares of Bearing Jobbers, Inc. (R. 3-6). Defendants answered, claiming the benefit of the contract of August 7, 1931 (R. 6-9). In the alternative, defendants contended that plaintiff was precluded from claiming ownership of Bearing Jobbers, Inc. because of its unclean hands in representing to the trade and public that M. H. Lescure was the owner of Bearing Jobbers, Inc. R. 9-10

The execution and delivery of the contract upon which defendant Lescure bases his rights was admitted in the pleadings. R. 15

Proceedings in the District Court.

The case was referred to a master for hearing and report. The issues tried before the master included whether or not there was good consideration for the contract of

August 7, 1931; whether the contract was executed and title to the certificate was transferred pursuant to the agreement of August 7, 1931, or whether the contract was an executory contract upon which plaintiff had a seller's lien; whether there was a valid pledge and whether the pledge had been rescinded or abandoned; and whether plaintiff was precluded by unclean hands from obtaining relief in a court of equity. The master filed his report on May 7, 1952, finding the issues for the plaintiff and against the defendants. (R. 696-752). Thereafter, defendants filed objections to most of the findings and conclusions of the master. R. 753-758

The case was heard by the District Court on objections to the master's report on the same issues. The District Court, in rendering judgment, affirmed the master's report and adopted his findings of fact and conclusions of law. The issue of whether the contract was intended to be valid was never raised or tried.

The Opinion of the Court of Appeals.

The Court of Appeals affirmed the judgment of the trial court but it did so in an opinion which completely ignored the issues submitted by the parties[1] and disregarded plaintiff's admissions in its pleadings, at the trial, and in the argument before the Court of Appeals.

After setting forth some of the material facts of the case, the court summarized the positions of the parties. It stated that it was contended on behalf of the plaintiff that the contract was executory and at most granted to defendant Lescure an option; that it was contended on behalf of the defendant that the instrument was an unambiguous con-

[1] Except for the issue raised by the alternative defense of unclean hands, which the court decided adversely to petitioners.

tract of sale of the stock in question and a repledge of that stock as security for the payment of the purchase price.[2] The court baldly rejected the contentions of the parties as being an oversimplification, rejected the admissions in the pleadings, rejected the evidence submitted to the master, and framed a new and untried issue as follows (R. 779):

> "we think that in this case the real issue which these parties tried below was not a question of the terms of the contract but rather the question of whether there was any valid written contract made between Nice and Lescure."

Having formed this issue, the court then proceeded to analyze evidence submitted by the parties on other issues and adjudicated that the contract in question was not a contract at all and that defendants had no rights under it.

---

[2] "We think that both the plaintiff and the defendants in their briefs in this court have over-simplified the questions presented by this case. The plaintiffs would have us decide that the document which the parties executed as of August 7, 1931, and their actions in connection therewith, constituted at most an executory contract between the parties by which the plaintiff at most granted the defendant Lescure an option to buy the stock of Bearing Jobbers, the option being expressly conditioned on, first, Lescure's paying $5,000 for the stock between January 1st and January 10th, 1933, second, on Nice not giving Lescure written notice of its termination of the 'agreement' prior to January 10, 1933, and, third, on Lescure's continuing to live until January 10, 1933. The defendants, on the other hand, insist that this instrument which the parties executed was an unambiguous, executed contract of sale by which Nice sold and delivered the stock to Lescure, taking back as security for the payment of the purchase price an assignment in blank of the stock certificate which had been issued in the name of Lescure and a written assignment of the dividends then due, or to become due, on said stock." (R. 778)

Respondent's Admissions.

No such issue as that upon which the Court of Appeals based its decision was tried in the District Court and no such issue was presented to the Court of Appeals. On the contrary the respondent (plaintiff) freely admitted that the contract in question, the agreement of August 7, 1931, was a valid agreement fully expressing the intent of the parties at the time it was written and thereby eliminated this as an issue in the cause.

Respondent's reply to the counterclaim of defendant M. H. Lescure states (R. 15):

> "1. Answering paragraph 1 of said Count I of the counterclaim, plaintiff admits that plaintiff and defendant Lescure made and entered into a certain agreement dated August 7, 1931, and that Exhibit A attached to defendants' answer is a copy of said agreement,"

And further in the same pleading plaintiff alleged (R. 15, 16):

> "the only right, if any, which defendant Lescure ever had to purchase or become the owner of all or any part of the stock of defendant Bearing Jobbers, Inc. was under and in accordance with the terms and conditions of the *aforesaid agreement* dated August 7, 1931" (Emphasis supplied)

Further, in paragraph 27 of respondent's amendment and supplement to complaint, the following appears (R. 28):

> "The aforesaid agreement dated August 7, 1931, was not at the time of the aforesaid tender [Feb. 21, 1950] or for many years prior thereto of any validity or binding effect. Defendant M. H. Lescure failed to perform the conditions of said agreement and the said agreement therefore *became ineffective* in accordance

with its terms *on, to wit, January* 10, 1933." (Bracketed matter and emphasis supplied)

Further, no such issue was tried before the Master. The following colloquy occurred before the Master (R. 309):

> Mr. Fowle: "... The plaintiff put the stock of Bearing Jobbers in the name of Mr. Lescure as a nominee in 1931, and we now insist that we have a right to have a stock certificate issued in the name of Nice Ball Bearing Company; that Mr. Lescure has been simply a nominee all these years, and these other matters are not related to the matter involved in this lawsuit.
>
> The Master: You have a contract behind that stock though.
>
> Mr. Fowle: *There is a contract there, yes, that is correct.*
>
> The Master: Now, do you want to say that contract does not mean what it says?
>
> Mr. Fowle: *We have not said that,* if the Master please. *We simply say that Mr. Lescure did not perform under the contract,* there was some sort of an agreement by which he apparently got some rights to acquire the stock for $5,000.00, provided he paid for the stock between January 1st and January 10th, 1933." (Our emphasis)

And further (R. 424):

> Mr. Fowle: "We have two theories. One theory is that the contract was an executory contract and he did not pay for it and that was the end of it, and the second theory is under the law of sales if he did not pay the money, we, the seller, having possession of the thing sold, had a right to rescind the contract and we did rescind it. Those are our theories."

Even in the argument before the Court of Appeals plaintiff adhered to the same position. Chief Judge Major asked plaintiff's counsel what the situation would be were the instant action brought prior to January 10, 1933. Plain-

tiff's counsel answered that defendants would prevail, thus inferentially admitting the validity of the agreement.

No evidence was offered to the effect that the contract either was or was not valid. In several instances petitioners, in phrasing their argument as to unclean hands, in order to dramatize the unequitable position of plaintiff in claiming relief in face of the contract, assumed the invalidity of the contract in a hypothetical sense. (R. 908, 1007). Petitioners, throughout the trial, treated the contract as admittedly valid, as did respondent.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In adjudicating the case on an issue not presented to it on the appeal, not adjudicated by the District Court, not tried before the Master, but, on the contrary, which had been foreclosed by the pleadings and by admissions at the trial.

2. In failing to accord to these defendants the effect of the admissions in the pleadings and at the trial that the contract was a valid contract.

3. In failing to adjudicate the cause on the issues before it, thereby failing to hold that the contract in question was a valid contract fully expressing the intent of the parties actually transferring title to the shares of Bearing Jobbers, Inc. to these defendants and in failing to reverse the judgment of the District Court in accord with those findings.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals in adjudicating the cause on an issue which respondent had removed from the case by admissions in its pleadings and at the trial, and which was therefore not tried before the master, not adjudicated by the District Court, and not before the Court of Appeals, deprived petitioners of an opportunity to be heard upon this issue and even of notice that such an issue existed. This was more than a violent departure from the accepted and usual course of judicial proceedings. It was a violation of petitioners' right to notice and hearing under the due process clause of the Fifth Amendment to the Constitution of the United States.

The effect of such admissions as respondent made in its pleading, at the trial and before the Court of Appeals is well settled.

In *Jones* v. *Morehead,* 1 Wall. (68 U.S.) 155, defendants admitted in their answer that they manufactured locks infringing plaintiffs' patent. Plaintiffs on trial introduced evidence bearing on the issue thus admitted by defendants. This Court refused to allow defendants to be relieved from the effect of their admission in the answer, stating (p. 165):

> "It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled, which is distinctly alleged in the bill, and admitted in the answer."

In *Hill* v. *Federal Trade Commission* (CA-5) 124 Fed. 2d 104, the Court, in giving effect to admissions made in an answer filed before the Federal Trade Commission, said (p. 106):

> ". . . it is fundamental that judicial admissions are proof possessing the highest possible probative value.

> Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue."

In *Euclid Candy Co.* v. *Whitney-Central Trust & Savings Bank*, (CA-6) 48 F. 2d 757, the sellers sued the buyer for breach of a contract for the sale of sugar. The buyer pleaded as a defense a breach of warranty. On appeal from a judgment for plaintiff the buyer urged the new defense that no contract had been entered into. The court held that the pleading of the breach of warranty was an admission of the contract of purchase, and concluded as follows:

> "The answer clearly states a contract which would have entitled the vendees to claim damage by reason of a breach of warranty,—if damage there had been. The trial below and the argument here proceeded, in part, upon the theory that there had been no meeting of minds of the principals, nor any actual contract, because the vendee's acceptance was accompanied by a material modification or condition, to which condition the vendor never had agreed. *No amendment of the defendant's pleading was asked for; and we think this theory was not open to it in the court below, or here. It planted itself upon the theory of a completed contract and a breach of the warranty therein contained. It must stand or fall upon that theory.*" (Our emphasis)

See also *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, (CA-3) 231 F. 638, in which defendant contended on appeal that plaintiff had not proved ownership of the copyright in question. The Court of Appeals said:

> "In paragraph VI the bill distinctly avers that the plaintiffs had title at the date of filing, and the answer expressly admits this averment. * * * In view of the express admission in the answer, the attempt that is made to attack the plaintiffs' title cannot be considered."

Admissions by counsel on the trial have a similar effect. *Shanley* v. *Bowers*, (CA-2) 81 Fed. 2d 13; *Harniska* v. *Dolph*, (CA-9) 133 Fed. 158.

The rule is the same where the admission is made on appeal. *O. F. Nelson & Co.* v. *United States*, (CA-9) 149 Fed. 2d 692.

The Court of Appeals in the case at bar not only denied to these petitioners the effect of respondent's admissions. The Court went further: It injected into the case for the first time the issue which had been removed from the case by those admissions, *viz.*, the validity of the contract of August 7, 1931, and proceeded to decide the case on the basis of its determination of that issue. This was more than a grave departure from the accepted and usual course of judicial proceedings; it was an outright denial to defendants of the right not to be deprived of their property without due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States.

This Court has held that the right to present evidence upon an issue in the case is a fundamental right guaranteed by the Constitution. In *Saunders* v. *Shaw*, 244 U.S. 317, this Court on a writ of error to the Supreme Court of the State of Louisiana reversed the judgment of that court and remanded the cause to the trial court. In the trial court defendant had objected to the admissibility of evidence on an issue which became material by a decision of this Court rendered after the trial court judgment had been entered. The trial court received the evidence in the record merely to save the question for review. Consistent with his position as to its immateriality, defendant introduced no evidence in rebuttal. The Supreme Court of Louisiana on appeal held the evidence material but did not remand the case for a new trial thereby denying to the defendant any opportunity to present evidence on this is-

sue. This Court, in an opinion by Mr. Justice Holmes, held that the defendant's constitutional rights had been violated because the case had been decided against him without his ever having had the proper opportunity to present his evidence. When the Court of Appeals for the Seventh Circuit similarly denied petitioners an opportunity to present their evidence upon the issue of the validity of the contract, it violated the same fundamental rights.

In *Helis* v. *Ward*, 308 U.S. 365, this Court granted certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on the grounds that that court had decided the merits of the case on facts not contained in the record and on a theory which had never been tried by the litigants. While it was held that the point for which certiorari was granted was not presented by the record, the opinion of this Court intimated that if it were, there would be grounds for reversal of the judgment.

This Court also has recognized, in construing the full faith and credit clause, the fundamental rule that a Court may not enter a judgment which is not responsive to the issues tendered by the pleadings. In *Reynolds* v. *Stockton*, 140 U.S. 254, in reviewing the judgment of the Court of Chancery of the State of New Jersey which refused to enforce a judgment of one of the courts of New York on the ground that the New York court entered judgment not responsive to the pleadings, this Court said (140 U.S. at 265):

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

And at 270:

> "But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."

This Court then concluded that the New Jersey court did not err in refusing full faith and credit to the New York judgment.

In no sense was the issue of whether or not the contract of August 7, 1931, was intended by the parties to be binding tried by the implied consent of the parties within the meaning of Rule 15(b) of the Rules of Civil Procedure for the United States District Courts. The pleadings of plaintiff specifically admitting the validity of the contract of August 7, 1931, as well as the specific disavowal by plaintiff's counsel of a challenge of the validity of the contract when made, show that the only issue tried was the interpretation of the contract.

No proof was submitted on the issue of whether the parties intended the contract to be binding. Merely because some of the proof admitted on other issues might seemingly bear on the issue said by the Court to have been tried does not mean that such an issue was tried by implied consent. In *Simms* v. *Andrews*, (CA-10), 118 Fed. 2d 803, at page 807, the court said:

> "The right to amend pleadings to conform to the proof proceeds upon the theory that by such amendment the pleadings are brought in line with the actual issues upon which the case was tried, even though such issues were not stated in the pleadings as originally drawn. In such case it is the duty of the court, after

> the evidence upon the supposed issue has been introduced without objection, to permit the amendment. Rule 15(b), New Rules of Federal Procedure; *Low* v. *Davidson Mfg. Co.*, 7 Cir., 113 F. 2d 364; *Lientz* v. *Wheeler*, 8 Cir., 113 F. 2d 767; *Swift & Co.* v. *Young*, 4 Cir., 107 F. 2d 170. This rule, however, does not authorize such an amendment merely because evidence which is competent and material upon the issues created by the pleadings incidentally tends to prove another fact not within the issues in this case."

See also *E. I. du Pont de Nemours & Co.* v. *Martin* (CA-6) 174 Fed. 2d 602. And even if petitioners had introduced proof on this issue, which they did not, respondent's admissions would not have been affected. *Jones* v. *Morehead*, 1 Wall. (68 U.S.) 155, 164-165, summarized at page 11, *supra*.

CONCLUSION.

If the action of the Court of Appeals for the Seventh Circuit in this case were to be sanctioned, no litigant could safely assume that an issue was eliminated from the case by an admission in his opponent's pleading or even by his opponent's admission at the trial. To properly protect himself against rejection by the trial or appellate court of admissions of his adversary in the pleadings or elsewhere in the course of the litigation, the litigant would be compelled to offer evidence on every conceivable issue and to rebut every possible defense which might arise in the case. The result would be to compound the burden of litigation, not only for the litigants but for the courts as well.

This court in *Helis* v. *Ward*, 308 U.S. 365, granted certiorari to review a judgment of the Court of Appeals solely on the grounds that that court had decided the case on

a theory which had not been tried by the litigants. This Court should grant certiorari for the same reason here, and on review on the merits reverse the judgment.

Respectfully submitted,

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